86-1515

NO. 396017
No. 01-84-0237-CR

SUPREME COURT, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1986

RAYMOND KELLY RUSSELL
PETITIONER

VERSUS

THE STATE OF TEXAS
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO

THE TEXAS COURT OF APPEALS

FIRST SUPREME JUDICIAL DISTRICT

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JANUARY, 1986

QUESTIONS PRESENTED

(1) WHETHER THE TESTIMONY OF WITNESSES, IF BELIEVED BY THE JURY WOULD CONSTITUTE SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION UNDER STATE STATUTE 36.14 AND ARTICLE 7.06 OF THE TEXAS CODE OF CRIMINAL PROCEDURE AND WHETHER THOSE STATUTES HAVE VALIDITY ON THE GROUNDS OF BEING REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES, 28 U.S.C. 1257(2).

LIST OF PARTIES

THE PARTIES TO THIS PROCEEDING IN THE COURT OF APPEALS WERE AS FOLLOWS:

DEFENDANT-APPELLANT:

RAYMOND KELLY RUSSELL

PLAINTIFF-APPELLEE:

THE STATE OF TEXAS

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LIST OF AUTHORITIES

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NO. 396,017

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* * * * * * * * *

Petitioner, RAYMOND KELLY RUSSELL, respectfully prays that a Writ of Certiorari issue to review the judgment of the Texas Court of Appeals, First Supreme Judicial District, entered in this cause on March 4, 1985, and affirmed by the Texas Supreme Court on November 20, 1985.

OPINION BELOW

The initial opinion of the Texas Court of Appeals is reported as RAYMOND KELLY RUSSELL, Appellant v. THE STATE OF TEXAS, Appellee, No. 01-84-0277-CR. The opinion is reproduced in the appendix of this petition at page A-1. The Finds of Fact, Conclusion of Law, and Final Judgment of the Trial Court are reproduced at Page A-2.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on May 4, 1985. Thereafter, a Petition for Discretionary Review was filed and denied on November 20, 1985. This Petition for Certiorari was filed within 90 days thereafter and is therefore timely under 28 U.S.C., Section 1257(2).

Constitutional and statutory provisions involved in this case arises under the due process clause of the Fourteenth

Amendment to the Constitution of the United States and 28 U.S.C., Section 1257(2), which provides as follows:

28 U.S.C., Section 1257(2):

"State Court's Appeal; Certiorari":

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

By appeal, where it is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constition, Treaties, or laws of the United States, and the decision is in favor of its validity.

STATEMENT OF THE CASE

Trial before the jury on the Petitioner's plea of not guilty resulted in a general verdict of guilty of criminal mischief (R. 1-28). On March 20, 1984, the jury returned a verdict of guilty and assessed punishment at confinement in the

Texas Department of Corrections for a period of six years, probated for six years, and a fine of three thousand dollars. R. 1-28,29)

STATEMENT OF THE PROCEDURAL HISTORY OF THE CASE

This case proceeded to trial on March 19, 1984. On March 20, 1984, the jury returned a verdict of guilty and assessed punishment at confinement in the Texas Department of Corrections for a period of six years, probated for six years, and a fine of three thousand dollars. A Motion for a New Trial was not requested. On December 5, 1984, Appellant filed a Motion for Permission to File a Late Notice of Appeal. On December 13, 1984, this motion was granted. On March 14, 1985, the Court of Appeals, First Supreme Judicial District, entered a judgment affirming the lower court's ruling. On November 20, 1985,

Defendant's Petition for Discretionary Review was denied.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred in its findings that the testimony of the state's witnesses, if believed by the jury, would constitute sufficient evidence to support a conviction. In reviewing the sufficiency of the evidence the Court must decide whether, after viewing the evidence in the light most favorable to the Prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Christian v. State, (Tex. Crim. Ap., Feb. 1985). In passing on the sufficience of the evidence, evidence must be viewed in the light most favorable to the verdict; Defendant's Evidence, as well as the State's evidence in the case-in-chief, may be considered in passing on the sufficiency question. See Drager v. State, 548 S.W. 2d 890 (Tex.

Crim. App. 1977). Any rational trier of facts must be able to find the essential elements of the offense above a reasonable doubt. U.S. v. Romano, 382 U.S. 136(1965); U.S. v. Cameron, 460 F. 2d 1394 (5th Cir. 1972); Fitzpatrick v. U.S., 412 F. 2d 513.

In the instant case, the Court erred in not dismissing the charges since the evidence was insufficient. Also, Texas State Statute 36.14 is unconstitutional. The facts indicated that the offense was committed on a dimly lit night. That the accusing witnessess allegedly observed the commitment of the offense from the apartment complex across the street. Defendant's wife testified that Defendant was in bed with her at the time the offense was committed and had reason to be at home since he made a practice of arising for work around 6:00 or 7:00 every morning (R.96,98). Defendant's father testified that he talked with the Defendant on the phone around

12:30 a.m. at Defendant's home on the date in question (R. 93). Garner v. Louisiana, 368 U.S. 199 (1960); Barnes v. U.S., 412 U.S. 837 (1973); U.S. v. Howard, 483 F. 2d 229 (5th Cir. 1973).

Despite the above-mentioned facts in question, which clearly create a reasonable doubt even when viewing the case in its most favorable light to the Prosecution, the lower court convicted Defendant and the Court of Appeals affirmed this conviction. The Court of Criminal Appeals cannot, in reviewing sufficiency of evidence, substitute its judgment on disputed issues for that jury. Where final decision of state court has substained validity of a state statute challenged on federal constitutional grounds, an appeal to the Supreme Court lies as a matter of right. Huffman v. Pursue, 420 U.S. 592 (1975); Religions Liberty v. Levitt, 413 U.S. 472 (1972).

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully prays this his Petition for a Writ of Certiorari in this cause be granted.

Respectfully submitted,

John W. Batchan, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 1986, I have mailed two (2) copies of the foregoing Petition for Certiorari for Petitioner in this cause to counsel for Respondent at the following address:

Don Clemmer
Assistant District Attorney
Harris County
201 Fannin, Suite 200
Houston, Texas 77002
(713) 221-5826

John W. Batchan, Jr.

APPENDIX A

COURT OF APPEALS
First Supreme Judicial District

OPINION

RAYMOND RUSSELL, APPELLANT

NO. 01-84-0237-CR V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 209th Judicial District
Court of Harris County, Texas
Trial Court Cause No. 396,017

This is an appeal from a conviction for the offense of criminal mischief. A jury assessed punishment at six years probation and a fine of $3,000.

Appellant raises two grounds of error, asserting that the evidence is insufficient to sustain the conviction, and that the indictment failed to describe the manner and means by which appellant allegedly damaged the complainant's truck.

In response, the state argues that this court does not have jurisdiction

to hear this appeal because the appellant did not file notice of appeal within the 15-day limit required under Tex. R. Crim. P., art. 44.08(b) (Vernon Supp. 1984).

On December 5, 1984, appellant filed a motion for permission to file a late notice of appeal. On December 13, we granted appellant's motion pursuant to Art. 44.08(e) Tex. R. Crim. P. (Vernon 1984). Therefore, this court has jurisdiction to hear the appeal.

In the first ground of error, appellant contends that the evidence was insufficient to sustain a conviction for criminal mischief because the appellant presented evidence that he was not at the complainant's home on the night in question.

The complainant, Donald Estep, testified that at approximately 1:00 a.m., January 11, 1984, he and his brother were awakened by a continuous knocking at the

fron tdoor to his apartment. While investigating the knocking, the complainant saw the appellant and two of his friends looking into the window of complainant's apartment. The complainant's brother testified that after he asked, "Who is it?", the appellant and his companions responded by running away. Moments later, the complainant heard a loud noise from the parking lot. Running to the parking lot, the complainant and his brother observed three individuals smashing the windows of complainant's truck with a sledge hammer. The appellant was identified by the complainant's brother and a neighbor as one of the men wielding the sledge hammer.

The appellant's wife testified that appellant was with her in their home on the evening that the offense occurred. The appellant's father also testified that he spoke with appellant on the telephone around the time that the offense occurred.

In reviewing the sufficiency of the evidence this court must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Christian v. State, (No. 436-84, Tex. Crim. App., Feb. 13, 1985) (not yet reported); the resolution of conflicts in testimony is in the exclusive province of the jury. See Drager v. State, 548 S.W.2d 890 (Tex. Crim. App. 1977).

Where there is any probative evidence on the elements required to establish that defendant committed the charged offense, the court may not disturb the findings of the jury on conflicting evidence. Vera v. State, 499 S.W.2d 168 (Tex. Crim. App. 1973). In the instant case, the testimony of the state's witnesses, if believed by the jury would constitute suf-

ficient evidence to support the conviction. This ground of error is overruled.

In his second ground of error, appellant contends that the indictment was fundamentally defective because if fails to describe the manner and means by which appellant damaged appellant's property.

In pertinent part, the indictment alleges that on January 11, 1984, the appellant did then and there unlawfully:

> intentionally and knowingly damage tangible property, namely one truck, owned by Donald Estep, a person having a greater right to possession of the property than the Defendant and hereafter styled the Complainant, without the effective consent of the Complainant, namely, without any consent of any kind, and the value of the pecuniary loss so inflicted was over seven hundred fifty dollars and under twenty thousand dollars.

An allegation of the manner and means of committing the offense is not a fundamental requisite of charging the

offense for purposes of invoking the district court's jurisdiction. Miller v. State, 647 S.W.2d 266 (Tex. Crim. App. 1983), and in the absence of a timely filed motion to quash, a defendant is not entitled to such allegations. Id. at 267; See also Cruise v. State, 587 S.W.2d 403 (Tex. Crim. App. 1979).

In the instant case, appellant failed to file a motion to quash the indictment, and therefore he failed to preserve any error in the state's omission to allege the manner and means of committing the offense. The judgment is affirmed. This ground of error is overruled.

/S/ Frank Evans
FRANK EVANS
Chief Justice

Associate Justices Smith and Cohen also participating.

No publication. Tex. R. Crim. App. P. 207.

JUDGMENT RENDERED AND OPINION DELIVERED MARCH 14, 1985.

TRUE COPY ATTEST:

/S/ Kathryn Cox
KATHRYN COX
CLERK OF THE COURT

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

APPENDIX (B)

RE: Case No. 0429-85
STYLE: Russell Raymond Kelly

November 20, 1985

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

COA#: 01-84-00237-CR

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

Supreme Court Bldg.

MAIL TO

John W. Batchan, Jr.
1001 Texas Ave, Suite 300
Houston, TX 77002

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0429-85
STYLE: Russell Raymond Kelly

December 6, 1985

On this day, the Appellant's Motion for Extension of time to file the Appellant's Motion for Rehearing was denied.

COA#: 01-84-00237-CR

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO

John W. Batchan, Jr.
1001 Texas Ave, Suite 300
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